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IN THE

Supreme Court of the United States

TPI, a/k/a THAI PETROCHEMICAL INDUSTRY PUBLIC COMPANY LIMITED, THAI PETROCHEMICAL LIMITED, THAI PETROCHEMICAL INDUSTRY PCL, TPI OIL (1997) CO., LTD. AND TPI OIL CO. LTD.,

Petitioners,

v.

WINTER STORM SHIPPING, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD H. WEBBER
Counsel of Record
JOHN J. SULLIVAN
HILL RIVKINS & HAYDEN LLP
Attorneys for Petitioners
45 Broadway – Suite 1500
New York, New York 10006
(212) 669-0600

180242

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED

At least fifty-two jurisdictions and the Federal Reserve have enacted Article 4A of the Uniform Commercial Code dealing with electronic funds transfers. Electronic funds transfers in dollars must generally pass through the United States, with U.S. banks acting as intermediaries between originating or sending banks and receiving banks. Sections 4A-502 and 4A-503 of the Code address the extent which a court may issue an order to enjoin, attach or otherwise interrupt an electronic funds transfer, holding that an electronic funds transfer may only be interrupted by court process at the originating bank or at the receiving bank, but not at the intermediary bank stage. The Second Circuit Court of Appeals has held in this case that an electronic funds transfer is nevertheless subject to attachment at the intermediary bank stage under Supplemental Admiralty Rule B of the Federal Rules of Civil Procedure, which allows for the service of process of attachment on a defendant's "tangible or intangible property". The Second Circuit has created an exception to the rule against such attachments otherwise in effect in all non-admiralty cases nationwide and even in admiralty cases where the electronic funds transfer passes through the Federal Reserve system.

The question presented is whether a federal district court sitting in admiralty should properly look to state law to determine whether a defendant has property in the district subject to attachment under Supplemental Admiralty Rule B, which does not define what is meant by "property", or does Rule B preempt state law such as the prohibitions of Article 4A of the Uniform Commercial Code against restraining an electronic funds transfer at the intermediary bank stage, where Article 4A provides that a defendant has no property at the intermediary bank stage subject to attachment.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Thai Petrochemical Industry PLC, also named as Thai Petrochemical Industry Public Company Limited, has no parent corporations, but is publicly traded.

Petitioner TPI Oil (1997) Co., Ltd. has as a parent corporation Thai Petrochemical Industry PLC, which is a publicly traded corporation and owns at least 10% of the stock of TPI Oil (1997) Co., Ltd.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The district court's opinion and order (per Scheindlin, D.J.) granting petitioners' motion to vacate the service of process of maritime attachment and garnishment served by the respondent and dismiss the complaint (Appendix ("Pet. App.)" 36a-52a) is published at 198 F. Supp. 2d 385. The court of appeals' opinion (per Haight, D.J., joined by Kearse and McLaughlin, JJ.), vacating the district court's opinion and order (Pet. App. 1a-35a) is published at 310 F.3d 263. The court of appeals' order denying rehearing and rehearing en banc (Pet. App. 55a-56a) is not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on November 6, 2002, and denied rehearing and rehearing en banc on January 13, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition involves the intersection of Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, (Pet. App. 57a-60a) the New York State Uniform Commercial Code Sections 4A-502 (Pet. App. 61a-63a) and 4A-503 (Pet. App. 64a), and Federal Reserve System Regulation J, 12 C.F.R. Part 210, *et seq*.

STATEMENT OF THE CASE

Respondent commenced this action in the district court by the filing of a summons and verified complaint and sought to obtain jurisdiction over petitioners by means of service of process of maritime attachment and garnishment on a third party garnishee, pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure. Respondent invoked the district court's admiralty and maritime jurisdiction pursuant to Rule 9(h) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") and 28 U.S.C. § 1333.

With the filing of its complaint, Respondent simultaneously applied for and obtained an order for the issuance of process of maritime attachment and garnishment pursuant to Fed. R. Civ. P. Supplemental Rule B(1). As none of the petitioners was subject to the *in personam* jurisdiction of the district court, respondent sought to cause the petitioners to appear by serving the process of attachment upon several garnishees thought to have custody of property of the petitioners. The garnishees identified in the process were Chase Manhattan Bank, Citibank and, as is relevant for this case, The Bank of New York (hereinafter "BONY"). On three occasions on June 28, 2001, and on two occasions again on June 29, 2001, respondent served BONY with copies of a Process of Maritime Attachment and Garnishment in this litigation. The Process had been signed on behalf of the Clerk of the Court of the Southern District of New York and directed BONY, as well as Chase Manhattan Bank and Citibank, as garnishees, to attach "Property, letters of credit, deposits, funds, credits, bills of lading or other assets of whatever form of TPI, a/k/a/ Thai Petrochemical, Industry Public Company Limited, Thai Petrochemical Industry PCL, TPI Oil (1997) Co., Ltd. and TPI Oil Co. Ltd." up the amount of $361,621.58.

Respondent served the Process upon BONY at 10:30am, 12:19pm and 4:44pm on June 28, 2001, and at 12:50pm and 1:45pm on June 29, 2001. In response to the Process, BONY promptly conducted a search of its records, which revealed that BONY was the custodian of no property or assets of TPI, a/k/a/ Thai Petrochemical, Industry Public Company Limited, Thai Petrochemical Industry PCL, TPI Oil (1997) Co., Ltd. and TPI Oil Co. Ltd. at the times of the service of the Process. As a result of one or more of the five services of the Process, however, and not later than the close of business on the afternoon of June 29, 2001, BONY placed a stop order on any funds relating to TPI, a/k/a/ Thai Petrochemical, Industry Public Company Limited, Thai Petrochemical Industry PCL, TPI Oil (1997) Co., Ltd. and TPI Oil Co. Ltd. passing through BONY in New York.

At all relevant times from June 28, 2001, to July 3, 2001, Bank Ayudhya Public Company Ltd. of Bangkok, Thailand, maintained an account with BONY in New York. At 6:48am on July 2, 2001, BONY received a payment order in respect of an electronic funds transfer in the amount of $1,085,071.41 by Bank Ayudhya, as the originating bank, on behalf of Thai Petrochemical Industry Public Co. Ltd., as sender, to the account of Oppsal Shipping Co., Ltd., as beneficiary, at The Royal Bank of Scotland P.L.C. in London. The transfer was by means of the SWIFT system, wherein Bank Ayudyha employed BONY in New York City as the intermediary bank between it and The Royal Bank of Scotland.

Because of the stop order placed as a result of the service of the Process of Maritime Attachment and Garnishment, BONY refrained from immediately executing the payment order that would have completed the electronic funds transfer from Bank Ayudhya to The Royal Bank of Scotland. Instead,

BONY placed $361,621.58 from the account of Bank Ayudhya in a suspense account and issued a payment order in the amount of the balance of $723,449.83 to the account of Oppsal at The Royal Bank of Scotland. Respondent served BONY with additional copies of the Process of Maritime Attachment and Garnishment beginning at 10:59am on July 2, 2001, by which time BONY had already placed the restrained funds, which had previously been on deposit in the account of Bank Ayudhya, into the suspense account.

In the ordinary course of business, BONY would have executed the payment order well before the next service of process, which occurred at 10:59am on July 2, 2001. BONY interrupted the transfer was interrupted only because of the service of process by respondent prior to the initiation of the electronic transfer and thus restrained an amount equal to the demand in respondent's complaint and in the Process.

The district court subsequently granted petitioners' motion to vacate the attachment and dismiss the complaint for lack of personal jurisdiction, holding that petitioners had no property in the custody of BONY subject to attachment. The court noted that Rule B, which allows for the exercise of jurisdiction over a defendant by means of the plaintiff's attachment of the defendant's "tangible or intangible property" in the district, does not define what is meant by the term "property." It also observed that no federal rule had been established as to whether a process of maritime attachment could be served upon an intermediary bank acting on an electronic funds transfer. The district court went on to follow the admiralty rule previously enunciated by the Second Circuit in *Reibor Int'l, Ltd. v. Cargo Carriers (KACZ-CO.), Ltd.*, 759 F.2d 262, 266 (2d Cir. 1985), that in the absence of a controlling federal maritime rule, a federal court sitting in admiralty may properly look to state law to fashion a suitable

admiralty rule. The district court consequently looked to New York State law, as embodied in Article 4A of the Uniform Commercial Code (hereinafter "UCC"). The district court concluded that Sections 4A-502 and 4A-503 of the UCC hold that at the intermediary bank stage an electronic funds transfer does not constitute the property of the sender and prohibit the attachment at the intermediary bank stage. The district court observed that application of Article 4A promoted "the proper harmony and uniformity of maritime law" in that fifty-two jurisdictions had enacted Article 4A of the UCC, and the Federal Reserve had enacted Article 4A by regulation to govern electronic funds transfer to and from Federal Reserve Banks.

Upon respondent's appeal, a panel of the Second Circuit vacated the judgment of the district court, holding that federal law preempted state law on electronic funds transfers, and that under Rule B electronic funds transfers were attachable property. The court of appeals disagreed with the district court that there was no guiding rule in federal law, relying upon the case of *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993), which had dealt with the arrest *in rem* of certain funds on deposit by the Department of Justice pursuant to the Drug Abuse Prevention & Control Act, 28 U.S.C. §§ 801, *et seq.* The court of appeals held that under its prior decision in *Daccarett*, electronic funds transfers were indeed subject to maritime process such as attachment at the intermediary bank stage. The court of appeals then went to hold that Rule B preempted New York State law as embodied in Article 4A of the UCC insofar as Article 4A purported to prohibit attachment of a funds transfer at the intermediary bank stage. On January 13, 2003, the Court of Appeals issued its order denying petitioners' motion for rehearing and rehearing en banc.

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

The Court should grant the instant petition for the following reasons. First, the case presents a novel question regarding the interplay of federal maritime and state law. Second, despite the novelty of the issue herein, the decision of the court of appeals is in conflict with holdings of this Court and the courts of other circuits regarding the constitutional issue that a federal court must look to state law for the definition of the term "property" where an applicable federal law does not define the term. Third, the decision of the court of appeals warrants immediate review because it has created for certain maritime actions an exception to a rule of law in effect in virtually every other factual scenario, an exception that would work considerable hardship to the banking industry and, in particular, could hamper the ever increasing number of electronic funds transfers that pass through the United States.

I. This Case Presents a Novel Question Regarding the Interplay of Federal Maritime and State Law

This Court in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), held that issuing a writ of certiorari was appropriate where a maritime case "presented novel questions as to the interplay of state and maritime law." 365 U.S. at 733. The instant case presents a novel question as to the interplay between Supplemental Admiralty Rule B and Article 4A of the Uniform Commercial Code. Whereas Rule B allows a maritime plaintiff to serve process of attachment upon the tangible or intangible property of a defendant not otherwise subject to the district court's jurisdiction, Article 4A, which has been enacted by no fewer than 52 jurisdictions and the Federal Reserve, holds that a party has no property interest

in an electronic funds transfer ("EFT") at the intermediate bank stage that could be subject to attachment. Both the district court and court of appeals were in agreement that there was little, if any, federal case law on point as to whether a maritime plaintiff could properly serve process of maritime attachment upon an electronic funds transfer. That little, if any, case law has addressed this specific issue has been likely due to the prohibitions in Article 4A. In light of the court of appeals' decision in this case rejecting the Article 4A rule in cases of maritime attachments, however, it is likely that a significant increase in the practice will result, burdening both the banking system and the federal courts with additional Rule B actions, if the court of appeals decision is allowed to stand.

II. The Court of Appeals' Holding Conflicts With Prior Decisions of This Court And Other Circuits on the Rule Requiring a Federal Court to Look to State Law to Define "Property" Where Federal Law Is Silent

The federal courts have consistently held that, where a statute does not define what is meant by "property," the court should instead look to state law to determine whether a party has a property interest capable of being attached.

This Court stated in *Barnhill v. Johnson*, 503 U.S. 393 (1992), a decision arising in a bankruptcy proceeding, that "[i]n the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law." *Id.* at 398 (citing *Butner v. United States*, 440 U.S. 48, 54 (1979)). The Court was addressing whether a certain payment by check constituted a transfer of the debtor's property within the preference period of 11 U.S.C. § 547(b). Although the Bankruptcy Code defined the term "transfer", it did not define "property". The Court looked to state law as embodied in

the Uniform Commercial Code to determine whether the funds represented by the check would have been considered the property of the debtor within the preference period.

In *Union Planters National Bank v. World Energy Systems, Assoc.*, 816 F.2d 1092 (6th Cir. 1987), the Sixth Circuit conducted a similar analysis in a maritime case to determine whether a purported Rule B attachment had reached any property of the defendant. Judgment creditors with a maritime claim had served a purported attachment upon an advising bank acting upon a letter of credit under which the judgment debtor had been the beneficiary. The Sixth Circuit, relying upon a decision of the Southern District of New York, held that the Rule B attachment must be vacated because the debtor did not have a property interest in the letter of credit at the time of the service of the process of attachment. 816 F.2d at 1098. The Southern District of New York case on which the Sixth Circuit had relied was *Dialan Love, S.A. v. Al-Haddad Bros. Enterprises, Inc.*, 584 F. Supp. 782 (S.D.N.Y. 1984), where the court had specifically held that an attachment served upon the advising bank had to be vacated because, under Article 5 of the Uniform Commercial Code, the defendant did not have a property interest in the letter of credit at the time of service of the process.

In addition to this Court's holding in cases involving the Bankruptcy Code, the rule that a federal court should look to state law for a definition of what constitutes property also has been applied to the Internal Revenue Code, *Don King Productions, Inc. v. Thomas*, 945 F.2d 529, 534 (2d Cir. 1991), the Foreign Sovereign Immunities Act, *Brenntag International Chemicals, Inc. v. Bank of India*, 175 F.3d 245, 252-53 (2d Cir. 1999); and the Ship Mortgage Act,

Chase Manhattan Services, Inc. v. McMillian, 896 F.2d 452, 460 (10th Cir. 1990).

Just as in the Bankruptcy Code, the Internal Revenue Code, the Ship Mortgage Act and the Foreign Sovereign Immunities Act, Supplemental Admiralty Rule B(1) does not define what is meant by the term "property", so that the court of appeals necessarily should have looked to state law. Had the court of appeals looked to state law to determine whether petitioners had any property interest in the electronic funds transfer, it would have been compelled to rely upon Article 4A of the Uniform Commercial Code. Instead, the court of appeals turned to a prior decision decided under the Drug Abuse Prevention & Control Act, 28 U.S.C. §§ 801, *et seq.* (hereinafter "the Drug Act"), a statute inapplicable in a maritime action between private litigants. The federal case on which the court of appeals relied was its earlier decision in *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993). The court of appeals' reliance on *Daccarett* as a source of applicable federal law was incorrect because the case had not been decided under the court's admiralty jurisdiction, but rather had been before the court under the Drug Act, a federal statute that empowers the U.S. government to seize proceeds traceable to illicit drug transactions. In contrast to Rule B, however, the Drug Act defines what the U.S. Department of Justice may seize, including, among other things,

> All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable

> instruments, and securities used or intended to be used to facilitate any violation of this subchapter.

28 U.S.C. § 881(a)(6). Although, at the time *Daccarett* was decided, Section 881(b) as written went on to authorize the U.S. Attorney General to employ the Supplemental Rules for Certain Admiralty and Maritime Claims merely as a procedural device to effect the seizures, the statute did not grant any authority to or create any right or cause of action for private party litigants in a civil action.

As the district court quite properly recognized (Pet. App. at 43a), the mere fact that the Department of Justice may seize funds at any bank as long as the funds have some "traceable connection to an illegal transaction in controlled substances" under the Drug Act, *Daccarett*, 6. F.3d at 54, bears no relevance to whether an EFT is property subject to attachment in a civil action brought by a private litigant. A private litigant in a purely civil action, such as respondent in this case, has available none of the rights or remedies afforded by the forfeiture statutes, but instead may rely only upon Rule B itself. As stated above, Rule B does not define property, so that a federal court sitting in admiralty must look to state law to determine what constitutes attachable property. *See, e.g., Union Planters National Bank*, 816 F.2d at 1098; *Ferrostaal Metals Corp.*, 652 F. Supp. at 424-25; *International Marine Consultants, Inc. v. Karavias*, 1985 WL 1515, at *4-5 (S.D.N.Y. 1985) (not officially reported) (applying New York corporate law to vacate a Rule B attachment because certain freights were not the property of a named defendant); *Dialan Love*, 584 F. Supp. at 785-86; *see, also, Brenntag International Chemicals, Inc.*, 175 F.3d at 252-53 (employing state attachment law to determine whether letter of credit was attachable within the meaning of the Foreign Sovereign Immunities Act).

III. The Court of Appeals' Decision Contravenes the Federal Goals of Uniformity in the Maritime Law and in the Banking System and, as a Result, Presents an Unworkable Hardship for the Banking Industry

The court of appeals' decision, contrary to the maritime law's unquestioned goal of uniformity and the federal courts' favoring of uniformity within the banking system, has carved out a narrow exception to the general rule in effect throughout the country that a claimant may not serve process of attachment upon an intermediary bank acting on an electronic funds transfer. Moreover, the court of appeals' decision inadvertently creates a division within the law of Rule B maritime attachments, because the Panel's decision applies only to funds transfers that do not use the Federal Reserve's FEDWIRE[1] system. The court of appeals' overlooked the fact that the Federal Reserve has adopted Article 4A of the Uniform Commercial Code *en toto as part of federal law* for all FEDWIRE transfers, including the prohibition against interruption of EFTs at the intermediary bank stage. Federal Reserve System Regulation J, 12 C.F.R. Part 210, *et seq.* The court of appeals reached this result, contrary to its previous exhortations in *Reibor International, Ltd. v. Cargo Carriers (KACZ-CO), Ltd.*, 759 F.2d 262, 267 (2d Cir. 1985), against establishing divergences between state attachment law and admiralty attachment law, particularly in New York.

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1. Three major electronic transfer systems are in operation in the U.S., including the FEDWIRE system operated by the various Federal Reserve banks. The other two major systems, which are purely private, are the SWIFT system, through which the EFT at issue in this case passed, and the CHIPS system, operated by the New York Clearing House Association.

As this Court stated over 125 years ago, one of the primary goals of the Constitution's grant of admiralty jurisdiction to the federal courts in Article III was to achieve uniformity in the maritime law. *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874). More recently, this Court has stated that when deciding a maritime case, a federal court must consider "the proper harmony and uniformity of maritime law." *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994). Even the court of appeals had previously stressed the importance of "consistent nationwide application of Rule B." *Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co.*, 85 F.3d 44, 48 (2d Cir. 1996). Indeed, in adopting Article 4A as part of federal law, the Federal Reserve made clear that one of its primary goals was uniformity in the law applicable to EFTs. 55 Fed. Reg. 40792 (Oct. 5, 1990).

The court of appeals' decision in this case, however, means that two different rules will apply to the purported Rule B attachments of EFTs at the intermediary bank stage, depending on which EFT system is employed by the sender's bank. For FEDWIRE transfers, a Rule B attachment is invalid at the intermediary bank stage because U.C.C. Sections 4A-502 and 4A-503 apply as a matter of federal law. Under the court of appeals' holding, however, an attachment served on an intermediary bank operating within private systems such as the CHIPS or SWIFT system could still be valid.

Moreover, as respondent has conceded, at least 52 jurisdictions have enacted Article 4A. "The fact of the nationwide acceptance of the Uniform Commercial Code is of no small significance to a court exercising its admiralty jurisdiction when so much of the lore of federal admiralty law stresses uniformity." *S.C. Loveland, Inc. v. East West*

Towing, Inc., 415 F. Supp. 596, 610 (S.D. Fla. 1976), *aff'd*, 608 F.2d 160 (5th Cir. 1979); *see also Woodward Governor Co. v. Curtiss-Wright Flight Systems, Inc.*, 164 F.3d 123, 129 (2d Cir. 1999) (stating that the application of the Uniform Commercial Code promotes federal law's interest in uniformity). Consequently, in virtually any state court action the purported attachment of an EFT at the intermediary bank stage would be invalid. Similarly, in light of Federal Rule of Civil Procedure 64, under which a district court adopts the attachment rules of the state in which it sits, any federal court attachment in a non-maritime case would be invalid. The Panel's holding thus drives a wedge between Fed. R. Civ. P. 64 and Rule B, which will lead to inconsistent results under each rule.

If the Panel's decision stands, therefore, one set of rules will apply to Rule B attachments of EFTs through the SWIFT and CHIPS systems, while the opposite rule will apply to Rule B attachments through the FEDWIRE system, as well as to all non-maritime actions, including those in state courts and those in federal courts sitting in diversity or hearing issues of non-maritime federal law. Such a situation would undoubtedly contravene prior exhortations against establishing

> disruptive divergences between state attachment law and admiralty law. Freeing garnishees from the burden of keeping track of yet another difference between state attachment law and admiralty attachment law has value in and of itself.

Reibor, 759 F.2d at 267. Intermediary banks therefore would be presented with the prospects of making determinations as to which types of process of attachment they must enforce

and which ones they may disregard, all within a matter of the few moments between receipt of the payment order issued by the originating bank and the moment they must issue their own payment order to the beneficiary bank. The consequences of such a rule could wreak havoc with the banking system, where efficiency of the execution of the volume of payments orders on electronic funds transfers requires promptness.

The potential deleterious effect on the banking industry was set forth concisely, yet in detail, in the briefs submitted in support of petitioners' petition for rehearing in the court of appeals by *amici curiae* the New York Clearing House Association, LLC, and the Federal Reserve Bank of New York. The New York Clearing House, operator of the CHIPS system, argued that the court of appeals' decision would inhibit the free flow of funds among financial institutions and could give rise to additional federal litigation against intermediary banks because of the uncertainty involved in each funds transfer. The New York Federal Reserve pointed out how the application of the court of appeals' decision could interrupt the flow of funds through Federal Reserve Banks, because of the uncertainty of whether Regulation J would be superseded by the application of Rule B. Petitioners respectfully submit that these compelling concerns, especially in light of the court of appeals' divergence from authority of this Court and of other circuits, merits issuance of a writ of certiorari in this case.

CONCLUSION

For the foregoing reasons, the instant Petition for writ of Certiorari should be granted.

Respectfully submitted,

RICHARD H. WEBBER
Counsel of Record
JOHN J. SULLIVAN
HILL RIVKINS & HAYDEN LLP
Attorneys for Petitioners
45 Broadway – Suite 1500
New York, New York 10006
(212) 669-0600